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ABSTRACT

This paper explores the rights of authors before publication of their works, if those works are to be published at all, and how these rights might yield to fair use of the works by other authors. Firstly, the paper examines the interests at stake of the three main groups involved: authors, the public, and people who wish to quote or closely paraphrase an author's work. Secondly, it discusses the rationale for copyright protections, fair use, and the first amendment, focusing on the Constitution and on the Copyright Act of 1976. Thirdly, the paper analyzes three recent decisions of the Supreme Court and the Second Circuit which involved quotations from unpublished works, looking at the facts of the three cases, the threshold copyrightability of the infringed material, and the four traditional fair use factors (purpose of the use, nature of the copyrighted work, amount and substantiality of the portion used, and the effect on the market). The paper's final section discusses the implications of these decisions, concluding that, as the law currently stands, the courts have put a heavy thumb on the scale in favor of ante-publication authors (leaving those who would quote or paraphrase in peril), and arguably have not advanced the quality or quantity of ideas. One hundred and twenty notes are included. (SR)

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Ante-Publication Rights and Fair Use:

Free Speech, Copyright and the Four Factors

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I. Introduction

The United States Court of Appeals for the Second Circuit handles far more than its share of copyright disputes. This is because the Second Circuit includes New York City, the heart of the United States book publishing industry. 1/ When the Second Circuit makes copyright decisions, they virtually become the law of publishing unless disturbed by the Supreme Court. 2/ When the Second Circuit speaks, the publishing industry listens. 3/

Recent Cases and Controversy in the Second Circuit

The last five years have been filled with controversy for the Second Circuit. Three important cases concerning the rights of authors before publication were handed down.

Harper and Row v. Nation Enterprises involved a news and commentary magazine's quotations from unpublished manuscripts of a book by former President Gerald Ford. 4/ The unpublished letters of recluse novelist J.D. Salinger quoted and paraphrased by a literary critic, turned biographer, were at issue in Salinger v. Random House. 5/ Finally, New Era Publications v. Holt involved quotations by a muck raking biographer from the private letters and published books of the science fiction writer, unorthodox religious leader and adventurer L. Ron Hubbard. 6/ Although the ear of the Supreme Court was sought in all three cases, only the first case, Harper and Row v. Nation, was heard by the Court. 7/

These cases are controversial because they attempt to articulate the rules for written expression in a free society. The original copyright holder, the quoter, and the

public all have interests at stake in these decisions. These interests will be discussed shortly.

The decisions are complicated because they draw from three possible sources of legal tradition, if not authority -- the constitutional copyright provision of Article I, section 8; the first amendment; and a panoply of traditional common law and equitable actions and remedies. I use the word tradition because even if one sees Article I, sec. 8 as the source of authority in these matters, the tradition of the first amendment and various common law and equity actions can be arguably read into the fair use provision of the copyright statute. 8/

The Purpose of This Paper

This paper will explore the rights of authors before publication of their works, if those works are to be published at all, and how these rights might yield to fair use of the works by other authors. Firstly, the interests at stake will be examined. Secondly, the rationale for copyright protections, fair use, and the first amendment will be discussed. Thirdly, the recent decisions of the Supreme Court and the Second Circuit will be analyzed. Finally, the implications of these decisions will be discussed.

II. The Interests at Stake

There are three main groups with interests at stake when deciding the ante-publication rights of authors. The copyright owner has an interest in being able to control how and when the work will be first published. The person who would quote the author's work has an interest in using the authors exact words or close paraphrases to make their own works more effective. Finally, the public has an interest in encouraging

the quantity and quality of books and other forms of communication available. The legal mechanics of how these interests are protected, or not protected, will be discussed later in this paper.

The Interests of Ante-Publication Authors

Authors have three main interests in ante-publication rights. Firstly, authors have an interest in protecting the labor which they invest in a work before it is published. Authors put two types of labor into their works. The first comes from the special knowledge and experience which authors have acquired in order to write the works. For example, a historian usually has years of schooling and experience which helps her to dig up facts and then analyze them in a compelling manner. The fiction writer brings education or years of perfecting an idea or technique. 9/ The second type of labor comes from work on the work itself. A historian may spend months, it not years, digging up facts and then painstakingly analyzing them. A fiction writer or artist may take a work through many drafts or complete revisions before it is finally ready. 10/ Authors have an interest in protecting the investment they have made.

Secondly, an author, and perhaps society, has an interest in making sure that the work is polished and ready for publication. A historian may check and recheck a work for inaccuracies many times before it is in a publishable form. A fiction writer may do many revisions and may make many changes before a work is ready for publication. Authors have an interest that their works are not published before they are in a polished form and ready for the public. 11/

Thirdly, like comedians, authors have an interest in timing the publication of their

work. For example, a history of presidential debates might create more interest and attract more readers if it is released during a presidential election campaign. On the other hand, it is often important that authors be able to promote their works immediately after publication. For example, a government official who wrote a book might need to wait until she has left a public post to publish the book in order to participate in promotional tours and other activities. 12/

At first blush, it would appear that the simplest protection for authors would be to just keep their works secret before publication. However, many authors are not in a position to do that. Authors must often share their ideas with many people in order to get financial backing, to secure a publishing contract with an advance, or even to check to see if there is a market for their work before proceeding to complete a work and then publish it. This often leaves authors in a vulnerable position. In the case of professional and personal letters, the necessity of sending them makes it impossible to keep them secret.

The Interests of Those Who Quote or Closely Paraphrase

Those who seek to quote or paraphrase ante-publication authors have several legitimate interests. To be sure, there are those bald faced thieves who would steal an author's work. However, here we are concerned with those who have loftier motives or at least mixed motives. Even though there is usually some interest in money involved, there is also legitimate interests in freedom.

Firstly, they, and perhaps the public, have an interest in commenting about matters of public concern as soon as they know about them. They do not want to wait

for the long publication process before the information is exposed to the public. 13/

For example, a news magazine might want to use a quotation or a close paraphrase in order expose the communication itself. When a politician or some other public figure insults a minority group with a slur, the words of the slur itself are news. A general paraphrase would not carry the same weight and might even mislead by not using the person's exact words. Because they were written in a private letter does not lessen their value as news.

In the case of a historical or biographical work, original letters and other documents often provide important grist for reasoned analysis. Quotations or close paraphrases provide clear evidence of the historical figure's communication. General paraphrasing may seem incredible and lessen the authoritative impact of the work. Often the original documents for such research may be published scores of years later, if at all. Widows, widowers and descendants often would rather hide embarrassing aspects of history than let them be exposed publicly. 14/

Secondly, they want to expose the words even if publication never happens. Authors do not always get their works published even if they try. Some authors choose not publish them at all. This is especially true of letters and other personal documents. They, and the public, have an interest that the information sees the light of day.

Thirdly, they have an interest in exposing the information in its raw form. Valuable material is often edited out of final works, either for artistic reasons or because the author wants to "white wash" the material or put a particular "spin" on it. The person who quotes or closely paraphrases has an interest in exposing this material in its

raw form as a way of contrasting it with the author's revisionist interpretation. This is especially important where an unauthorized biographer challenges the conclusions of an authorized biography, an autobiography, or even public relations depictions.

The Interests of the Public

The public has a simple interest in the creation and dissemination of ideas. Fresh ideas are nutrition for the country's intellectual appetite.

Yet, it is not clear how to maximize the quality and the quantity of ideas. One camp argues that the best way to maximize ideas is to grant limited monopolies in order to encourage authors to create. 15/ Another camp argues that while it is good to grant authors a monopoly, the scope of that monopoly should be sharply limited so that later authors can freely build upon their foundations. 16/ Free speech and fair use are seen as important in keeping the ideas flowing. These two points of view will be handled in more detail later in this paper. For now, it is enough to say that the public has an interest in the quantity and quality of ideas.

III. The Rationale for Copyright, Fair Use and the First Amendment

The Constitutional Basis for Copyright

The power of Congress to write statutes concerning copyright comes from Article I, Section 8 of the Constitution where Congress is given the power to "promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." 17/ The framers of the Constitution were familiar with the concept of copyright as it had gradually evolved in England, but there is very little reliable evidence of what they were

thinking when they drafted the clause. 18/ The committee that drafted the clause left no records, the clause was adopted without debate, and only Madison mentioned it in the Federalist Papers -- devoting all of one vague paragraph to it. 19/

Congress has used its power by passing several copyright statutes, the first passing in 1790 and the latest passing in 1976, taking effect in 1978. 20/ Although all of these acts created a limited monopoly for authors, the scope of these acts varied significantly. In addition to limitations on the scope, these acts usually contained some provisions for unauthorized "fair use." The obvious problem in drafting such statutes is to promote intellectual industry by providing the incentive of an economic gain through a limited monopoly, while not so restricting access that the public is unreasonably cut off from intellectual products.

Ante-Publication Provisions of the Copyright Act of 1976

Before 1978, copyright was governed by the 1909 copyright act and its 1947 amendments. 21/ Copyright was protected by a dual system of federal and state protections with publication as the all important dividing line. Once the work was published, federal copyright applied but before publication state statutes, common law or equitable remedies protected authors. 22/

The distinction between a published work and an unpublished work was extremely important -- an author could lose rights if she or he did not carefully follow the procedures for securing copyright laid out in the act. Although the difference between unpublished and published works might at first seem simple, this bright line lost much of its illumination. Publication, traditionally envisaged as printed copies, became

an increasingly burdensome standard as the "20th - century communication revolution . . . [made] the concept of publication . . . increasingly artificial and obscure." 23/

The House Committee on the Judiciary, in drafting the new act, was troubled by the difficulty that the courts were having in applying the publication standard. The committee reported:

> To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given "publication" a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair. 24/

Under this old system, if the author had an unpublished work, as determined by the courts, then she or he could seek relief under state copyright. In addition to common law or statutory copyright, actions based on misappropriation, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, deceptive trade practices and several other theories could be found scattered in reports throughout the country. 25/

The Copyright Act of 1976 dramatically changed the landscape of pre-publication rights for authors and the concept of copyright in general. 26/ The act brought a sweeping new federal presence into the pre-publication world previously dominated by state statutes, common law, and equity.

At the heart of this sweeping change is the very definition of a copyrighted work. Under the new act, the author is entitled to copyright protection as soon as the work is fixed in a tangible medium of expression. 27/ Thus, for most purposes the awkward

distinction between pre- publication and publication is eliminated as soon as the work is fixed in a tangible medium of expression. The act also codifies the traditional copyright distinction between original expression, which is protected, and ideas, procedures, processes, systems, methods of operations, concepts, principles, or discoveries which are not protected. 28/

The 1976 act preempts state copyright but preserves state remedies for things which are not the subject matter of federal copyright or not equivalent to any of the exclusive rights under the act. 29/ It should be noted that the drafters did not feel that a work must achieve federal statutory copyright in order to fall within the subject matter of federal copyright, thereby losing state statutory, common law, and equity protection. The House Committee on the Judiciary, in drafting the statute, reported that: "As long as a work falls within one of the general subject matter categories of sections 102 and 103 . . . the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify . . . ." 30/

Fair Use in the 1976 Copyright Act

The 1976 act also, for the first time, contains a fair use provision:

> "Notwithstanding the provisions of 106, the fair use of a copyrighted work including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." 31/

The definition does not cover all possible fair uses because the drafters thought that, "no generally applicable definition is possible" and that "each case raising the question must be decided on its own facts." 32/

However, the 1976 act does offer a list of standards which should be considered with fair use.

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work;
4. the effect of the use upon the potential market for or value of the copyrighted work. 33/

In laying out these factors, the drafters borrowed heavily from the courts' development of the fair use doctrine. They said that, "Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." 34/

First Amendment Interests and the Copyright Act

When Congress drafted the copyright act, they could not help but be aware of the free speech issues associated with copyright. The first amendment represents the country's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." 35/ Yet, Congress offered little guidance in addressing how the first amendment and the copyright act might be reconciled.

There are two possible areas where first amendment values might be implicitly

embodied in the copyright act. The first is fairly settled, and the second remains controversial.

First amendment values are embodied in sec. 106 of the act which gives rights to original works of authorship 36/ and sec. 102 which allows copyright only for expression and not for facts or ideas. 37/ For example, in Nation Justice O'Connor, writing for the Court, held that there are, "First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas." 38/

First amendment values are also arguably embodied in the sec. 107 fair use provisions of the act. The strength of the embodiment depends, somewhat, on the theoretical view of copyright used. The prevailing view is that there is a property like interest enjoyed by the copyright holder. This was the view recently expressed by the Supreme Court in Sony Corp. v. Universal City Studios 39/ and later in Nation. 40/ A minority view sees the copyright act more as a regulatory device and less of a grant of property rights. Under this view, the problem is seen as a balance between the goodof encouraging authors through economic reward and the goodof encouraging others to freely express and broadly disseminate information. 41/ Justice Brennan, in his dissenting opinion in Nation, joined by Justices White and Marshall, explained the rationale for this view of copyright.

> Congress thus seeks to define the rights included in copyright so as to serve the public welfare and not necessarily so as to maximize an author's control over his or her product. The challenge of copyright is to strike the "difficult balance

between the interests of authors and inventors in the control and exploitation of their discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." 42/

Against this backdrop, the Supreme Court and the Second Circuit grappled with the ante-publication rights of authors and the fair use rights of quoters under the copyright act.

IV. Resolving Ante-Publication Rights and Fair Use Claims in Nation, Salinger and New Era

The Facts of the Three Cases

These three cases all involved quotations from unpublished works and one, New Era, also involved some quotations from published works. All but Nation, involved quotations from sources available from libraries or public records. All but Nation also involved injunctions against the infringer.

Harper & Row v. Nation Enterprises 43/ involved 300 to 400 words of quotations by the Nation magazine from drafts of former President's Ford's then upcoming book, A Time to Heal. Time magazine, who had contracted to run excerpts of the book with the book publisher, backed out of the deal after feeling that they had been "scooped." 44/ The Supreme Court, found that Nation had violated copyright and that the fair use defense did not justify the infringement. 45/

In Salinger v. Random House 46/ the recluse author J.D. Salinger sought an injunction to stop publication of an unauthorized biography which made extensive use of the author's letters. The biographer had submitted a draft to Salinger who objected to

the use of extensive quotations from personal letters. The biographer then revised the book and included close paraphrases of 44 personal letters and 200 words of quotations. Still objecting, Salinger brought suit to enjoin further publication of the book. The Second Circuit Court of Appeals found copyright infringement and that the fair use defense did not justify the infringement. The court approved a preliminary injunction to bar publication of the book. 47/

Finally, in New Era Publications International v. Henry Holt & Co. 48/ a debunking biographer quoted 132 passages from L. Ron Hubbard's unpublished diaries and letters along with quoting 69 passages of published material in his book Bare-Faced Messiah. The point of the book was to show that L. Ron Hubbard had lied throughout his career about his travels, his academic accomplishments, and his research accomplishments. All but three of the passages of published material were found to be noninfringing or fair so the case centers on the unpublished work. 49/ The Second Circuit decided not to approve an injunction, not because they found the infringement fair use, but because New Era had waited too long and was barred by the equitable concept of laches from seeking an injunction. 50/

Threshold Copyrightability of the Infringed Material

The first task of a court in looking at copyright infringement is to determine if the passages took ideas and information which are not subject to copyright under sec. 102 or took expression embodied in the work which can be copyrighted. 51/ In addition, under sec. 106, that expression must be more than minimal and must be original enough to be considered an original work of authorship. 52/

In Nation, Justice O'Connor, writing for the Court found that the quotations between 300 and 400 words or 13% of the article in Nation was copyrightable expression and implied that Nation had virtually conceded that the material was copyrightable. 53/ However, she did make note of the dicta of the lower courts concerning the confusion over the copyrightability issue but said that they need not reach that issue in Nation. 54/ The way she crafted the opinion leaves this question open for later decisions by the Court.

> Perhaps the controversy between the lower courts in this case over copyrightability is more aptly styled a dispute over whether The Nation's appropriation of unoriginal and uncopyrightable elements encroached on the originality embodied in the work as a whole. Especially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression. . . . We need not reach these issues however, as The Nation admitted to lifting verbatim quotes of the author's original language totaling between 300 and 400 words and constituting some 13% of The Nation article. 55/

In Justice Brennan's dissenting opinion, joined by Marshall and White, the issue of copyrightability was central. Justice Brennan disagreed with the Court's fair use analysis and felt compelled to address the threshold question which Justice O'Connor passed over quickly. Justice Brennan found controlling the sec. 102 distinction between "literary form" that is copyrightable and the "ideas and information" that is not. 56/

"[I]nfringement must be based on a taking of literary form, as opposed to the ideas or information contained in a copyrighted work." 57/

Justice Brennan then looked at the paraphrases used in the Nation article and found that they were uncopyrightable for three reasons. He then went on to look at the structure of the work and also found no infringement.

> First, some leeway must be given to subsequent authors seeking to convey facts because those "wishing to express the ideas contained in a factual work often can choose from only a narrow range of expression . . . ."
>
> Second, much of what The Nation paraphrased was material in which Harper & Row could claim no copyright.
>
> Third, The Nation paraphrased nothing approximating the totality of a single paragraph, much less a chapter or the work as a whole . . . . The article does not mimic Mr. Ford's structure. 58/

The issues not discussed by O'Connor yet addressed by Brennan's dissent later prove important in the Second Circuit cases of Saliner and New Era which the Supreme Court declined to hear. Perhaps after these issues ripen in the circuits, the Court will address problem.

In Salinger, 59/ the Second Circuit addressed the copyrightability issue within their discussion of fair use. However, Judge Newman, writing for the court, addressed the paraphrasing issue and found that there was more than mere ideas and information being taken.

> In almost all of those instances where the quoted or paraphrased passages from Salinger's letters contain an "ordinary" phrase, the passage as a whole displays a sufficient degree of creativity as to sequence of thoughts, choice of words, emphasis, and arrangement to satisfy the minimal threshold of required creativity. And in all of the instances where that minimum threshold is met, the Hamilton paraphrasing tracks the original so closely as to constitute infringement . . . . Of [the] 44 letters the Hamilton biography copies (with some use of quotation or close paraphrase), protected sequences [constitute] at least one third of 17 letters and at least 10 percent of 42 letters. These sequences are protected, notwithstanding that they include some reporting of facts and an occasional use of commonplace word or expression. Hamilton's use of these sequences "exceeds that necessary to disseminate the facts." 60/

At first blush, it may seem that the Second Circuit in Salinger expanded the concept of a copyrighted work to include paraphrases. However, it should be noted that the biographer in Salinger, may have changed the words in the letters, but kept much of their structure. 61/ Applying Justice Brennan's test expressed in his dissent in Nation, even if you give leeway to the wording the underlying structure may be so close as to infringe. It may be a mere mimic of Salinger's letters.

In New Era, the Second Circuit again discussed the idea/expression distinction within its discussion of fair use. The tactic of the biographer was to compare what L. Ron Hubbard and his followers claimed in their published materials with unpublished diaries, records and personal letters written by Hubbard. In so doing, the book was

intended to expose L. Ron Hubbard as a liar. As mentioned before, the Second Circuit addressed only the takings from unpublished works because the trial judge had found that most of the takings from published works were fair use. The Second Circuit did not look back at the actual quotations in making its decision.

Judge Miner, writing the opinion of the court, rejected the discussion of the trial judge and found no first amendment questions outside of the fair use doctrine. Almost asking for Supreme Court review, Judge Miner wrote that:

> We are not persuaded, however, that any first amendment concerns not accommodated by the Copyright Act are implicated in this action. Our observation that the fair use doctrine encompasses all claims of first amendment in the copyright field . . . , has never been repudiated . . . . An author's expression of an idea, as distinguished from the idea itself, is not considered subject to the public's "right to know." 62/

Judge Minor thus sees a fairly sharp distinction between expression and ideas and is in sharp contrast to Justice Brennan's balance laid out in his dissenting opinion in Nation. Justice Brennan said that "[t]he originality requirement now embodied in sec. 102 of the Copyright Act is crucial to maintenance of the appropriate balance between these competing interests. Properly interpreted in light of the legislative history, this section extends copyright protection to an author's literary form but permits free use by others of the ideas and information the author communicates." 63/ "This limitation on copyright also ensures consonance with our most important First Amendment values." 64/

The Four Fair Use Factors

The four traditional fair use factors are found in early court cases and are embodied in sec. 107 of the copyright act. While these factors seem reasonable on their face, they are deceptively complex going to the heart of what copyright and free speed mean in a free society. Not surprisingly, the courts have had considerable trouble in dealing with quotations or paraphrases from unpublished works.

1. Purpose of the Use

In Nation, Justice O'Connor noted that the purpose of the Nation article was news reporting, an example listed in sec. 107 but found that that was just one factor in the fair use analysis and not itself controlling. 65/ Justice O'Connor then characterized the purpose of the use as at least partly commercial because there was an expectation of profit from the infringement and that expected profit makes the use presumptively unfair. 66/ Justice Brennan, in dissent, found just the reverse and argued that the news reporting aspect of the use, regardless of commercial gain,
"strongly favors a finding of fair use." 67/

In Salinger, the Second Circuit found that the biographers use of Salinger's letters fit comfortably within this factor because the purpose could be considered criticism, scholarship, or research. 68/ Curiously however, the Court seemed to put some "body english" on the argument and concluded that, "In sum we agree with the District Court that the first fair use factor weighs in Hamilton's favor, but not that the purpose of his use entitles him to any special consideration." 69/

Judge Minor in New Era found that "[as] long as a book can be classified as a

work of criticism, scholarship or research, as can the book here, the factor cuts in favor of the book's publisher whether the copyrighted matter is taken from a literary lion like J.D. Salinger or a purported prophet like L. Ron Hubbard." 70/ However, here again, the curious phrase used in the Salinger decision was quoted that this factor does not entitle the second author any special consideration. 71/

The Supreme Court, and later the Second Circuit, seem to address but minimize the first fair use factor. Justice O'Connor defused the impact of the first factor by emphasizing the commercial profit motive of the Nation. The Second Circuit seemed to go beyond that by saying that the factor doesn't entitle the second author to any special consideration. Although the courts and later Congress chose this as the first fair use factor, the Supreme Court and the Second Circuit do not seem to think that it is the most important. This might be because these courts are seeing copyright more through a property model rather than from a regulatory model where the copyright owner's rights of use are weighed against first amendment free speech values.

2. The Nature of the Copyrighted Work

Justice O'Connor in Nation, found that there is a greater need to disseminate factual works such as this historical narrative or autobiography and that ordinarily brief quotations "are arguably necessary to convey the facts" but that the Nation when beyond that to excerpt the subjective descriptions of public figures by former President Ford. 72/ Justice O'Connor went on to say that the scope of fair use is narrower for unpublished works. She said that "[w]hile even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech that had been delivered to the

public or disseminated to the press . . . the author's right to control the first public appearance of his expression weighs against such use of the work before its release." 73/ She went on to say that "the right of first publication encompasses not only the choice whether to publish at all, but also the choices when, where, and in what form first to publish a work." 74/

Not surprisingly, Justice Brennan in dissent disagreed with the Court. He agreed with the court that there is a greater need to disseminate factual works, but disagreed with the Court's "categorical presumption" that unpublished works are protected from fair use. 75/ He argued that the different economic impact made possible by the unpublished nature of the work should be properly analyzed under the fourth factor by looking at the actual or potential economic harm. 76/

Judge Newman, in Salinger, when confronted by what he termed as the ambiguity of the Court in Nation, chose a nearly absolutist position. He said that:

> We think that the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression. Narrower "scope" seems to refer to the diminished likelihood that copying will be fair use when the copyrighted material is unpublished." 77/

He then, obviously, found that the second factor weighed against the biographer because Salinger's letters were unpublished and found only in libraries. 78/

The Second Circuit in New ERA, again found that when unpublished works are involved, "the second fair use factor has yet to be applied in favor of an infringer, and

we do not do so here." 79/ The court found the second factor to weigh heavily against the biographer because of the unpublished nature of the quoted letters and diaries. 80/

The key to fair use and unpublished works is the second factor. Although the Supreme Court said that there was a presumption against fair use with unpublished works, the Second Circuit has taken the concept and run with it. They have applied the concept in near absolute terms and have used it to weigh heavily, if not decisively against any possible fair use of unpublished material.

3. Amount and Substantiality of the Portion Used

In Nation, the Court looked at both the quantity and the quality of the parts taken. Although the Court found that the actual quantity of the manuscripts taken was insubstantial, it found that the parts taken were the 'heart of the book.' 81/ Justice, O'Connor, writing for the Court, found that the "fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's expression." 82/

Justice Brennan, in dissent, also found an insubstantial quantitative taking but went further to look at the qualitative aspects. 83/ He also wrote that the Court had lost the distinction between information and literary form. To Justice Brennan, neither the quantity nor quality of the expression taken was inappropriate for the news reporting context and speculated that if the same words had been quoted in a book review after publication, the Court would have no trouble finding fair use. 84/

In Salinger, Judge Newman found that paraphrases should be counted as part of

infringement. He thought that if the passage as a whole contains a sufficient degree of creativity as to sequence of thoughts, the choice of words, emphasis, and arrangement, it should be copyrightable. 85/ And where that is found, Hamilton's close paraphrasing of letters "tracks the original so closely as to constitute infringement." 86/ In addition, he applied the Nation analysis and found that the qualitative takings were not fair use. 87/ Overall he found the factor to weigh heavily against the biographer. 88/

The Second Circuit in New Era relied primarily on a quantitative approach and found the biographer's takings to weigh against fair use. 89/

4. The Effect on the Market

Justice O'Connor, writing for the Supreme Court in Nation, found that this last fair use factor is "undoubtedly the single most important element of fair use." 90/ Liberally citing economists in footnotes to justify her ruling, she held that the first author need only show a "reasonable probability [of] the existence of a causal connection between the infringement and a loss of revenue, [after which] the burden properly shifts to the infringer to show that this damage would have occurred had there been no taking of copyrighted expression." 91/ The first author need only show that if the "challenged use should become widespread, it would adversely affect the potential market for the copyrighted work" 92/ not only for the original work but also for harm to the market for derivative works. In dissent, Justice Brennan disagreed with the court's market analysis. 93/ He turned again to the distinction between literary forms and expression. He found that there waslittle proof that the publisher of Ford's book lost money specifically because of the infringing expression and not because of the ideas and

information which were properly exposed. 94/

In Salinger, Judge Newman followed the Nation analysis and found that, although there would still be great interest in a publication of Salinger's letters, the value of the work would be somewhat diminished by the biography. 95/ He found that the factor weighed slightly against fair use. 96/

Judge Miner, in New Era, used a similar analysis to that used in Salinger. 97/ He found that the possibility that New Era would publish an authorized biography meant that there is at least some impairment of the market. He found that the factor weighed slightly against fair use. 98/

The importance that the Supreme Court assigns to this factor and the speculative nature of potential market damage make this last provision a mine field for those who would use quotations or paraphrases. If Justice Brennan is right and it is difficult to distinguish between market damage because of infringement of expression and market damage because of the exposure of ideas and information, then the very success of a second author's publication, might be seen as evidence of damage to the market of the first author's potential work. The burden is even more difficult, because the Court has held that an infringer who mixes infringing elements and noninfringing elements must be able to show how much profit was from the noninfringing element or the whole profit is assumed to be from the infringing work. 99/

V. Potential Changes in Research and PublicationBrought About by Nation, Salinger and New Era

The decisions in Nation and its Second Circuit progeny are predicted by many to

have severe impact on authors. Predicting long term commercial behavior on the basis of court decisions is a speculative exercise at best. Yet, there appears to be genuine concern among authors.

The group of authors most affected are those who publish commercially. This not only includes virtually all major book publishers, but also most news organizations. In this country publishing a book or reporting the news is usually done through for-profit organizations. Despite this fact, Justice O'Connor found under the first fair use factor that any for-profit infringement, even news reporting, is presumptively unfair. 100/ Remember in Nation, the Nation magazine was considered by the court to be engaged in news reporting. Yet, that did not shield it from copyright liability even though the first fair use factor specifically discusses news reporting.

From the reasoning of Nation, many common sources of news reporting are endangered. Presumably, any letter or document which falls into the hands of a news organization cannot be quoted or closely paraphrased without running afoul of the copyright act. News organizations might counter in two ways. Firstly, they might revert to the undisclosed source technique, or they might avoid the story altogether. Either method makes it more difficult for the public to be fully informed about news and able to make up their minds based on the evidence.

In the world of historians and biographers, the impact of the rulings is even more pronounced because their discipline is expected to be more precise than the rapid breaking nature of news reporting. Historian Neil Sheehan, winner of the 1988 National Book Award for his book A Bright Shinning Lie, suggested that the recent rulings would

have a chilling effect on authors in doing serious, but commercially published, research. He said:

> Someone could decide "I don't want to be in your book, and I'm going to sue you if you quote one sentence of my letter." They can decide this when you're long committed to the project. That has a hell of a chilling effect on me. 101/

David Garrow, Pulitizer Prize winner for his book Bearing the Cross and a professor at the City College of New York reports that "these chilling effects are already showing up in the publishing process." 102/ He reports:

> James Reston, Jr., author of The Lone Star: The Life of John Connally, recently was forced to truncate his use of letters that Mr. Connally had written to Lyndon B. Johnson. The literature scholar Victor Kramer has been unable to publish his work on James Agee because of an executor's refusal to grant permissions. Publication of a major biography of a prominent African-American leader of the 1960's is being blocked because of fears that hostile heirs [sic.] might file suit over the author's use of unpublished letters. Indeed, another heir [sic.] -- the widow of the novelist Richard Wright -- already has sued the writer Margaret Walker Alexander for quoting in her biography of Wright unpublished letters that he wrote years ago to Alexander herself. 103/

Even if the original authors of letters or other people who have obtained rights in those works are willing to grant permission for the author to quote, simply finding them might be a herculean task. This amounts to a pragmatic obstacle to the flow of ideas. Taylor Branch, who won the 1989 Pulitzer prize for history with his book Parting the

Waters, feels that the rulings will impede work on his current writing effort, a massive history of Martin Luther King, Jr. and the civil rights movement. He said:

> I'm as apprehensive as I can be. . . . If the lawyer says you have to have permission before you can use it, then the writer has to contact everyone. In my case, there would be hundreds of different sources, some living, some dead. It's a really severe disadvantage that heaps a big burden on a job that's difficult already. 104/

In academe, the problem may be even more vexing. Individual scholars may not have the resources to do the legal legwork necessary to clear copyright hurdles. Their works might be great in scholarly value but minimal in commercial value and therefore cannot afford the investment of getting permission from all the copyright owners. Of course these handicaps might help the authors in the first fair use factor and the last fair use factor. However, Justice O'Connor made it clear in Nation that the scope of fair use is narrower for unpublished works and the Second Circuit decisions hold that unpublished works hold complete protection against fair use. In addition, according to the analysis in Nation, the economic impact in fair use factor four concerns not only the infringing author's profits but the potential impact on the profits of the copyright holder should such infringements become wide spread. Thus an innocent scholarly endeavor without expectation of great profit, might still be seen as creating potential economic havoc. Finally, but perhaps most importantly, scholars with limited resources might find it far more difficult than publishing houses to fight copyright actions in court even if their fair use positions are defensible.

Unpublished sources such as letters and diaries are "staples of scholarship in many fields." 105/ The practice is so common that many scholars have yet to fully appreciate the full impact of Nation and its progeny. According to Pulitizer prise winning academic author David Garrow, "Many individual scholars, however, continue to ignore the problem -- and that is foolhardy. When some of us have warned our colleagues about the threat to research and writing, many profess utter disbelief that American courts could have imposed such restrictions." 106/

Academic scholars who faithfully attempt to get permissions for their quotations or close paraphrases from unpublished works are at a greater disadvantage than their commercial counterparts. Scholars might feel compelled to take less critical stances toward their subjects in order to get permissions, they might run into permission fees which they cannot hope to pay, or they might feel forced allow owners of copyright to condition approval on the content of the work. 107/ In all of these cases, the quality of scholarship suffers. In the words of David Garrow:

> In short, by giving such all-powerful leverage to copyright holders, only "approved" or "friendly" treatments will be able to make use of unpublished primary-source documents. Censorship that is totally contrary to American scholarly and journalistic traditions will thus be imposed by virtue of the Second Circuit's insistence that all previously "unpublished" quotations receive prior approval. 108/

Although it is difficult to understand the full commercial and scholarly effects of Nation and the Second Circuit cases, biographers, historians, and news reporters are

clearly concerned that the cases will hamper their work. It is also clear that the authors are concerned about permissions which they feel amounts to private censorship of interests which are similar, if not identical to the traditional interests which are protected by the first amendment in other contexts. While, most authors are not lawyers, it is interesting to listen to how they react to the cases. An example of this concern is found in the words of 1988 National Book Award Winner Neil Sheehan, 'This is a garrote, a kind of slowly tightening constriction on the First Amendment.' 109/

VI. Conclusions

Coping with the ante-publication rights of authors is a problem new to the current 1976 Copyright Act. Prior to the act, all rights before publication were left to state copyright, common law, or equitable actions. Now, under the new act, federal copyright applies as soon as a work is fixed in a tangible medium of expression. 110/ The courts are carefully trying to test the ground to determine the appropriate legal standards for ante-publication copyright. The success of these emerging legal standards should be judged against the three interests at stake with ante-publication rights.

Nation, Salinger, New Era and the Interests at Stake

At the beginning of this paper, the interests of the ante-publication authors, the interests of those who would quote or closely paraphrase, and the interests of the public were examined in some detail. As the law currently stands, it appears that the courts have put a heavy thumb on the scale in favor of ante-publication authors, have basically left those who would quote or closely paraphrase in peril, and arguably have not advanced the quality or quantity of ideas.

The courts have made their choices by loading the four fair use factors in favor of ante-publication authors and against those who would quote or closely paraphrase. For the first fair use factor, the purpose and character of the use, the courts have chosen to minimize uses such as scholarly criticism, research or news reporting -- factors listed in sec. 107 of the Act -- if there is any commercial profit involved. Such a bright line between profit and not-for- profit ignores the nature of publishing and news reporting in the United States. Most, if not virtually all, book releases and news reporting is done on a for profit basis. Serious scholarly books or in-depth investigative reporting may not be profit leaders in their respective industries, but they do generate some profit.

The net effect of such an interpretation is the likely reduction in quality of scholarly works available to the public. There is an irony here. If profit is truly the engine of expression, then quoters or close paraphrasers are allowed only where there is no profit at all to drive the expression.

In the second fair use factor, the nature of the copyrighted work, the courts relied on the distinction between unpublished works and published works and virtually ignored other aspects of the copyrighted works. This monolithic distinction is largely a judicial creation not directly ordained by the statute. In fact, in Nation and later in the other cases, the courts admitted that the takings might be considered fair use if the copyrighted work had been published. The troubling aspect of the treatment of this factor is that works such as private letters in libraries (Salinger), material obtained from the government through the freedom of information act (New Era) and similar works which probably will never see the light of day, cannot be quoted or closely paraphrased.

The courts are at least stretching to suggest that the copyright holder of the smallest letter or document will be motivated by the profit motive to publish it. This is even more unlikely where the letter or document is embarrassing to the author or the subsequent copyright owners. In the Salinger case, it is hard to believe that the recluse author will ever be persuaded by profit to publish his letters. In the New Era case, it is equally unlikely that the controlling interests of the Scientology church will subject their deep beliefs to ridicule for a mere permission fee.

From a property perspective of copyright, it might make sense to allow individual property rights to exclude all the world from copying regardless of the reason. However, from a regulative perspective, it makes little sense to allow individual caprice to hamper the scholarly efforts of critical authors and to deny the public the fruits of diverse views.

In the third fair use factor, amount and substantiality of the portion used, is also usually weighs against an author. Although this determination is made on a case by case basis, the use of both a quantitative and qualitative standard should be carefully examined. When arguing that a particular quotation or series of quotations are at the heart of a work, a careful distinction must be made between the key facts, which are not protected by copyright, and the key expression which is protected by copyright. As Justice Brennan correctly points out, it is difficult to separate qualitatively important quotations from the facts and ideas which they reveal. This problem will be more fully discused later in this paper.

Finally, the fourth fair use factor, the effect on the market, is used by the court

to place tremendous burdens on the defendant infringer. Under the standards in Nation, the ante-publication author must only show a reasonable probability of a causal connection between the infringement and loss of revenue in the potential market for the copyrighted work. The approach assumes that the damage to be measured is the financial harm if the practice of infringement becomes wide spread, even if it does not actually become widespread. The infringer then has the onerous burden of showing that the damage would have occurred had there been no taking of copyrighted expression. In other words, the infringer must show that the ideas and facts, rather than the expression, are what is valuable. Such speculative predictions about potential markets is hardly a reliable standard. In all of the cases, the courts have found this factor to weigh against the quoter or close paraphraser.

A close examination of the Nation, Salinger and New Era courts' treatment of the four fair use factors leads to the conclusion that the factors are found almost always to weigh in favor of an ante-publication author and against an unauthorized quoter or close paraphraser. Market analysis seems to be an important, if not the controlling aspect, in the analysis of several of the fair use factors. It is interesting to note that the decisions seem to acknowledge that these takings would have been fair use if they had not occurred before publication of the copyrighted work. Thus, as applied, the four fair use factors have little utility in balancing the interests of the ante-publication authors, those who would quote or closely paraphrase, and the public. This type of analysis assumes that a property model should be used to exclude the world even if the values of the first amendment -- that debate on public issues be uninhibited, robust, and wide-open -- are

left wanting.

Such an absolutist approach makes little sense even from a pure economic model since the burdens placed on those who would quote or paraphrase are so heavy that the optimum economic production of worthwhile works is jeopardized. 111/ Judge Pierre Leval, trial judge for both the Salinger and New Era cases, delivered a thoughtful lecture about the subject at New York University. In it, he carefully reexamined his own successes and mistakes in looking at fair use and ante- publication rights and concluded that:

> The Court of Appeals opinions in Salinger and Hubbard so diluted the market test that the fair user virtually cannot win. They count this 'most important' test in the plaintiff's favor if the court can imagine any small loss of copyright value. By definition every fair use involves some loss of royalty revenue because the fair user has not paid royalties. To allow a speculative, insignificant effect on the market to swing the most important factor is effective destruction of the fair use privilege. 112/

Threshold Copyrightability and First Amendment Values

There are two areas where first amendment values might be applied without running into the lopsided fair use questions. In Nation, Justice O'Connor said that the sec. 102 provisions which deny copyright to ideas and facts provides first amendment protections. 113/ In his dissent, Justice Brennan also says that first amendment protections are incorporated in sec. 106 provisions which deny copyright protection to works which lack sufficient originality or are too minimal to merit copyright protection.

114/ Surprisingly, it should be noted that the Second Circuit in both Salinger and New Era ignored the Supreme Court's dicta and found that all first amendment values in copyright are expressed in the fair use factors. 115/

Firstly, does every letter, note, document, record or other writing really rise to the level of an original work of authorship? More importantly, does every quotation or sentence taken from a work in and of itself, justify copyright as an original work of authorship or are such quotations too minimal to justify copyright standing on their own? While some are undoubtedly works, some might be found to be uncopyrightable on their face. This type of analysis would rule on the copyrightability before the fair use standards need be applied. Perhaps a narrower category of what are indeed copyrightable works with sufficient originality for authorship might be a better approach to protecting legitimate original authors while allowing historians and biographers access to common sources such as memos, simple letters, records, and so forth.

Secondly, and perhaps more importantly, when quotations or paraphrases are taken, are secondary authors really taking copyrightable expression or are they taking facts and ideas. Although it is difficult to separate facts and ideas from the form of expression in which they are embodied, such an analysis might help to decide if the quotations were copyrightable in the first place. To a biographer who finds that a historical figure called another historical figure a "jackass," the words convey historical fact more than they convey any original authorship. There is little that is valuable about the words chosen beyond the facts and ideas which they convey. These two factors might be well suited to the particular problems of quotations and close paraphrases faced by

historians, biographers, and news reporters. Fair use provisions, might then be left to problems where entire works orsignificant amounts of the works are used.

Legislative Reforms

Criticism of Nation and it progeny among the publication and academic communities has been great. These groups are currently pushing legislation to nullify these court decisions. 116/ Identical bills have been introduced in the United States House of Representatives 117/ by the honorable Robert Kastenmeier of Wisconsin and in the United State Senate by the honorable Paul Simon of Illinois. 118/
The bills would amend the 1976 Copyright Act by inserting the "whether published or unpublished" after "fair use of a copyrighted work." 119/ The sponsors hope that the amendment would open up some breathing space for biographers, historians, and news reporters similar to that now in effect for published works. As of this writing no hearings have been scheduled on either bill.

In any event some type of reform is needed. If the needs of secondary authors are to be balanced effectively against the needs of other authors to have a limited monopoly in their original works of authorship. Such a balance must be struck carefully, but such a balance must be struck. Perhaps the thoughtful words of Judge Leval, the trial judge in Salinger and New Era will be inspiration for striking such a balance.

> Philosophy, criticism, history, journalism continually engage in the reexamination of yesterday's intellectual events. This vital process of reexamination cannot occur unless the law places limits on the artist/author's monopoly, permitting

> others to make productive use. This serves a vital role in informing society and educating society. . . . Not since Athena sprung from the head of Zeus has an artist emerged fully formed. There is no such thing as a wholly original thought. Every idea takes a substantial part from what has gone before. Intellectual man [sic.], like biological man [sic.] displays the genes of his forebears. Titan's Venus and Goya's Maja are both present in Manet's Olympia. Cezanne's geometric reductions are found in Picasso's cubism. T.S. Eliot tells us that while lesser writers borrow, great writers steal." 120/

In order to continue our intellectual growth at optimal levels, we must find an appropriate balance between the rights of ante-publication authors and those who would quote or closely paraphrase their works. The ultimate standard to test the effectiveness of the balance is how does it advance the public interest and not how it advances the peculiar interests of the copyright holder. Sadly, it is difficult to say that the Court in Nation or the Second Circuit in Salinger and New Era developed persuasive standards to advance the public interest by giving near unlimited rights to the ante-publication author.

VI. Notes

1. See Marcus & Streilfeld, Justices Permit Strict Curbs on Use of Unpublished Writing, Washington Post, Wed. Feb. 21, 1990, at A1, col. 1.
2. Id. at A4, col. 1 ("because the ruling is binding in New York, the center of the publishing industry, it essentially represents the last word in copyright law").
3. See Id. at A4, col. 1. See also Fair Use of Unpublished Materials in the Second Circuit: The Letters of the Law, 54 Brooklyn L. Rev. 417, 460 (1988) (phone interviews were made with the counsel of major publishers. The interviews revealed that the counsel were being much more conservative when giving advice to authors about using quotations).
4. 723 F.2d 195 (2nd Cir. 1983), rev'd, 471 U.S. 539 (1985).
5. 811 F.2d 90 (2nd Cir. 1987), cert. denied, 484 U.S. 890 (1987).
6. 873 F.2d 576 (2nd Cir. 1989), cert. denied, ___ U.S. ___ (1990).
7. 471 U.S. 539 (1985).
8. U.S. CONST. art. I, sec. 8; U.S. CONST. amend. I.
9. See J. Barzun & H. Graff, The Modern Researcher (4th ed. 1985).
10. See Id. See also E. Carn, What is History (1961); M. Mandelbaum, The Anatomy of Historical Knowledge (1977).
11. See J. Barzun & H. Graff, supra note 9.
12. See Nation, 471 U.S. 539, 596 (1985).
13. See Nation, 471 U.S. at 593 (Brennan, J., dissenting. News organizations have an

interest in using the quotations of newsworthy persons immediately). But see Nation, 471 U.S. at 557 (O'Connor, J. "The fact that the words the author has chosen to clothe his narrative is not an independent justification for unauthorized copying of the author's expression prior to publication").

14. See New Era, 873 F.2d 576 (unplublished letters and records critical of a self styled religious leader may have never been made public). See also Fair Use of Unpublished Materials in the Second Circuit, supra note 3 (forcing biographers or historians to negotiate with the author of letters or representatives of a deceased author's estate in order to clear copyright objections would skew historical or biographical works because it is unlikely that permission would be granted unless either large sums are paid and/or assurances are made that nothing be written that puts the author in a bad light).

15. See Nation, 471 U.S. at 560 (O'Connor, J. "The Framers intended copyright to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas"). But see Fisher, Reconstructing the Fair Use Doctrine, 101 Harv. L. Rev. 1661 (1988).

16. See Nation, 471 U.S. at 589, 590 (Brennan, J. dissenting, "To ensure the progress of arts and sciences and the integrity of First Amendment values, ideas and information must not be freighted with claims of proprietary right"); see also, Comments, A Regulatory Theory of Copyright: Avoiding a First Amendment Conflict, 35 Emory L.J. 163 (1986).

17. U.S. CONST. art. I sec. 8.

18. See Fenning, The Origin of the Patent and Copyright Clause of the Constitution, 17 Geo. L.J. 109 (1929).

19. See The Federalist Papers (C. Rossiter, ed. 1961) (J. Madison, Federalist No. 43).

20. 17 U.S.C. secs. 101-810 (1976).

21. Former 17 U.S.C. sec. 10 (repealed) ("Any person entitled thereto by this title may secure copyright for his [sic.] work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by the authority of the copyright proprietor").

22. Former 17 U.S.C. sec. 2 (repealed) ("Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent and to obtain damage therfor").

23. H.R. No. 94-1476, 94th Cong. 2d Sess. (1976) reprinted in 17 U.S.C.A. sec. 301.

24. Id.

25. See 18 Am.Jur.2d Copyright and Literary Property sec. 7.

26. 17 U.S.C. sec. 101.

27. 17 U.S.C. sec. 102 (a) ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device").

28. 17 U.S.C. sec. 102 (b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such a work").

29. 17 U.S.C. sec. 301 (a) ("On or after January 1, 1978, all legal or equitable rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of a copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under common law or statutes of any State").

30. H.R. No. 94-1476, 94th Cong. 2d Sess. (1976), reprinted in 17 U.S.C.A. sec. 301. But see 17 U.S.C. sec. 301 (b) (legal or equitable rights not equivalent to rights under the scope of federal copyright may be protected under state law and equity).

31. 17 U.S.C. sec. 107.

32. H.R. No. 94-1476 94th Cong. 2d Sess. (1976).

33. Id. at 66.

34. 17 U.S.C. sec. 107. See also Folson v. Marsh, 9 F.Cas. 342 (No. 4,901)(CC Mass. 1841) (Justice Story laid out almost identical factors).

35. See New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). See also

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) (copyright is designed to take into account our most important first amendment values).

36. 17 U.S.C. sec. 106.

37. 17 U.S.C. sec. 102.

38. 471 U.S. at 560.

39. 464 U.S. 417, 561 (1984).

40. 471 U.S. at 562.

41. See A Regulatory Theory of Copyright, supra note 16 (copyright should be viewed as a regulatory function which balances the rights of authors with first amendment interests).

42. 471 U.S. at 580 (Brennan, J. dissenting, quoted part of the Sony case as well to support his views on what might be called a regulatory balance theory).

43. 471 U.S. 539 (1985).

44. Id. at 543.

45. Id. at 569.

46. 811 F.2d 90 (2nd Cir. 1987), cert. denied, 484 U.S. 890 (1987).

47. Id.

48. 873 F.2d 576 (2nd Cir. 1989), cert. denied, ___ U.S. ___ (1990).

49. Id. at 580.

50. Id. at 584.

51. 17 U.S.C. sec. 102.

52. H.R. No. 94-1476, reprinted in 17 U.S.C.A. sec. 301 (some works under the scope of federal copyright may be "too minimal or lacking in originality to qualify").

53. 471 U.S. at 548, 569.

54. Id. at 548.

55. Id. at 548.

56. Id. at 580; 17 U.S.C. sec. 102 (b).

57. 471 U.S. 539, at 582.

58. Id. at 585, 586.

59. Salinger v. Random House, 811 F.2d 90 (2nd Cir. 1987), cert. denied, 484 U.S. 890 (1987).

60. Id. at 98.

61. Id. at 93, ft. nt. 2.

62. New Era Publications International v. Henry Holt and Co., 873 F.2d 576, 584 (2nd Cir. 1989), cert. denied, ___ U.S. ___ (1990).

63. 471 U.S. at 580, 581.

64. Id. at 582.

65. 471 U.S. at 561.

66. Id. at 562.

67. Id. at 591.

68. 811 F.2d at 96.

69. Id. at 97.

70. 873 F.2d at 583.

71. Id.

72. 471 U.S. at 563, 564.

73. Id. at 564.

74. Id. at 564.

75. Id. at 595.

76. Id. at 598.

77. 811 F.2d at 97.

78. Id.

79. 873 F.2d at 583.

80. Id. at 583. Compare New Era Publications International v. Carol Publishing Group, 904 F.2d 152, 157 (2nd Cir. 1990)(A critical biography of L. Ron Hubbard that used only published quotations was fair use and did not violate copyrights).

81. 471 U.S. at 564.

82. Id. at 565.

83. Id. at 598.

84. Id. at 601.

85. 811 F.2d at 98.

86. Id.

87. Id. at 98, 99.

88. Id. at 99.

89. 873 F.2d at 583. But see New Era Publications International v. Carol Publishing

Group, 904 F.2d 152, 158 (2nd Cir. 1990)(Small takings from many works are protected by fair use even though they may add up to a substantial portion of the biography).

90. 471 U.S. at 566. But see New Era Publications International v. Carol Publishing Group, 904 F.2d 152, 169 (2nd Cir. 1990)(Judge Feinberg, writing for the court, found that a critical biography that quoted published works would not "tap any sources of economic profit that would otherwise go to the authorized biography").

91. Id. at 567.

92. Id. at 568.

93. Id. at 602.

94. Id. at 602, 603.

95. 811 F.2d at 99.

96. Id.

97. 873 F.2d at 583.

98. Id.

99. Harper & Row v. Nation Enterprises, 471 U.S. 539, 567 (1985).

100. 471 U.S. at 562.

101. Marcus & Streilfeld, supra note 1, at A4, col. 3.

102. Garrow, Point of View: A Law Defining 'Fair Use' of Unpublished Sources is Essential to the Future of American Scholarship, Chronicle of Higher Education, Wed. April 18, 1990, at A48, col. 3.

103. Id.

104. Marcus & Streilfeld, supra note 1, at A4, col. 3.

105. Garrow, supra note 102, at A48, col. 1.

106. Id.

107. See Id. at A48, col. 2.

108. Id. at A48, col. 3.

109. Marcus & Streilfeld, supra note 1, at A1, col. 2.

110. 17 U.S.C. sec. 102 (a).

111. For an excellent discussion of the limitations of Justice O'Connor's economic analysis see Fisher, supra note 15.

112. Leval, Fair Use or Foul? The Nineteenth Donald C. Brace Memorial Lecture, J. Copyright Soc'y U.S.A. 167, 175 (1989).

113. 471 U.S. at 560.

114. 471 U.S. at 580, 581.

115. 873 F.2d at 584.

116. See Garrow, supra note 102, at A48, col. 1.

117. H.R. 4263, 101st Cong., 2d Sess. (1990).

118. S. 2370, 101st Cong., 2d Sess. (1990).

119. H.R. 4263, 101st Cong., 2d Sess. at 1 (1990).

120. Leval, supra note 112, at 169.